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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1214

HENRY FLETCHER THOMAS - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

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IN THE

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October Term, 1974

No. _____

HENRY FLETCHER THOMAS - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals was entered on February 24, 1975. This decision will not be published. A copy of that opinion is presented to the Court in Appendix A attached hereto.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was rendered and entered on February 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A. Whether the petitioner was denied a fair trial due to the erroneous admission of both evidence of other crimes either committed or allegedly committed by the petitioner and of the petitioner's prior criminal record in relation to the time he spent in jail.

B. Whether 18 U.S.C. Appx. §1202(a)(1) is applicable to a convicted felon's receipt of a firearm when said firearm was not in or affecting commerce after the date of enactment of this Act.

STATUTE INVOLVED

18 U.S.C.A. Appx. §1202(a)(1) at page 494:

> Any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

A. Nature of the Proceedings

On July 9, 1974, an indictment was returned before Judge Charles Allen, charging the petitioner with violation of 18 U.S.C. Appx. §1202(a)(1)—a convicted felon in possession of a firearm. The Honorable James F. Gordon presided over the trial by jury which was

held on August 22, 1974. The jury found the petitioner guilty as charged in the indictment. On August 29, 1974, judgment and commitment were entered ordering the petitioner to serve a two (2) year sentence. Notice of appeal was filed on August 30, 1974. On February 24, 1975, the Sixth Circuit Court of Appeals filed an Order affirming this decision (Appendix A).

B. Statement of the Facts

In the early morning of February 17, 1974, the petitioner, who had previously been convicted of a felony, along with another individual, Robert Faust, was arrested by officers of the Louisville police force. A gun was recovered from these individuals; however, there was a conflict in the testimony as to who was in possession of the gun at the time of the arrest. The charges placed against the petitioner that day were filed away in the Louisville city police court. On June 6, 1974, the petitioner was arrested by Agent Patrick Sheehy of the Bureau of Alcohol, Tobacco and Firearms. The aforementioned indictment resulted from this arrest.

At trial there were constant references to crimes either committed or allegedly committed by the petitioner. To each of these references the petitioner objected. The evidence at trial revealed that the gun traveled in interstate commerce in January of 1968, and had not been in interstate commerce since that date. The evidence further revealed that the petitioner had been convicted of a felony in April of 1968. The

petitioner stipulated that he had been in the LaGrange Reformatory, and previously convicted of a felony.

As stated above, the jury retired and returned a verdict of guilty.

REASONS FOR GRANTING THE WRIT

A. The Petitioner Was Denied a Fair Trial Due to the Erroneous Admission of Both Evidence of Other Crimes Either Committed or Allegedly Committed by the Petitioner and of the Petitioner's Prior Criminal Record in Relation to the Time He Spent in Jail.

Throughout the trial of this case, testimony was admitted which related to other crimes either committed or allegedly committed by the petitioner, and to the petitioner's prior criminal record in relation to the time he spent in jail. The Court of Appeals for the Sixth Circuit maintained that while the admission of this evidence was erroneous, they believed it was harmless error beyond a reasonable doubt (Appendix A). The petitioner asserts that the admission of this testimony denied him a fair trial and that the opinion of the Sixth Circuit Court of Appeals sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is well established that evidence of prior criminal activity is generally inadmissible to prove the charge for which the criminal defendant is currently standing trial, *United States* v. *Rudolph*, 403 F. 2d 805 (6th Cir., 1968), and *United States* v. *Nemeth*, 430 F. 2d 704 (6th Cir., 1970). Equally well established is

the doctrine that the government may not attempt to introduce evidence in its case-in-chief of a defendant's imprisonment, *Michelson* v. *United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); *United States* v. *Gray,* 468 F. 2d 257 (3d Cir., 1972); and *United States* v. *Nemeth, supra.* Furthermore, where inadmissible evidence is admitted, an important element of a fair trial is destroyed, *Bruton* v. *United States,* 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Therefore, if statements were admitted at trial which were inadmissible, it is readily apparent that the petitioner was denied a fair trial.

Notwithstanding the fact that due to the nature of the offense involved in the case at bar certain aspects of the petitioner's prior criminal activity must be introduced, the entire proceeding in the lower court was replete with allegations and insinuations as to the petitioner's criminal activity and his conduct as a prisoner. Various offenses were alleged to have been committed by the petitioner. Those offenses were as follows: theft, stripping an automobile, and grand larceny. These allegations were made by different witnesses. Furthermore, the actual nature of the offense for which the petitioner had previously been convicted was mentioned at numerous stages in the proceeding. Although the petitioner does not question that the fact that he had previously been convicted of a felony was relevant, he does maintain that the actual offense for which he had been convicted should not have been disclosed to the jury. As stated above, there was also evidence which related to the petitioner's prior crim-

inal activity. The arresting officer stated that after the petitioner had been given his Miranda warnings, the petitioner stated that he had served every day of his prison sentence. The government also went into detail as to fingerprints secured from the penitentiary where the petitioner had served his sentence. Clearly, the admission of this testimony denied the petitioner a fair trial.

Congress, through the Commerce Clause, has extended the jurisdiction of the federal government to still another essentially state offense. The nature of this charge is prejudicial to the defendant in the first instance. Therefore, the courts should carefully protect the safeguards of the defendant to insure that a fair trial is provided. The proceeding in the lower court could not have been deemed a fair trial.

Wherefore, the petitioner calls for this Court to exercise its power of supervision and grant certiorari inasmuch as the opinion rendered by the Sixth Circuit Court of Appeals in this case has sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings.

B. 18 U.S.C. APPX. §1202(a)(1) Is Not Applicable to a Convicted Felon's Receipt of a Firearm When Said Firearm Was Not in or Affecting Commerce After the Date of Enactment of This Act—June 19, 1968.

The question presented is whether 18 U.S.C. Appx. §1202(a)(1) is applicable to a convicted felon's receipt of a firearm when said firearm was not in or affecting commerce after the date of enactment of this Act—

June 19, 1968. The opinion rendered by the Sixth Circuit Court of Appeals in this case decided an important question of federal law which has not been, but should be, settled by this Court.

The petitioner asserts that the phrase "after the date of enactment of this Act" modifies not only the verbs "receives, possesses or transports," but also the phrase "in or affecting commerce." Therefore, not only must the receipt, possession or transportation of the firearm be subsequent to June 19, 1968, the nexus with interstate commerce must also be subsequent to that date. In *United States* v. *Bass,* 404 U. S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971), this Court stated that the government could establish this nexus in regard to receipt of a firearm if the government could show that the firearm had *previously* travelled in interstate commerce. The Court left open the question as to any modification of the word *previously.* The petitioner asserts the modification required by the statute is that the interstate travel of the firearm must be subsequent to June 19, 1968.

In the case at bar, the only time the firearm was "in or affecting commerce" was in January of 1968, prior to the date of enactment of the act in question. As stated in *Bass, supra,* at page 350, the offense of "possession or transportation of a firearm in or affecting interstate commerce" may be established "if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce." However, should the statute be interpreted to denounce all transactions where a con-

victed felon receives a firearm which has at some point during the life of the weapon travelled in interstate commerce, whether before or after the date of enactment of this Act, then the statute would be given a retroactive effect. This would be contrary to the long-cherished doctrine of jurisprudence that laws are enacted for the future. This Court held in *United States v. Donnelly's Estate,* 397 U. S. 286, 294, 90 S. Ct. 1033, 1038, 25 L. Ed. 2d 312 (1970) that "Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward." Furthermore, "retroactivity, even where permissible, is not favored, except from the clearest mandate, . . ." *Claridge Apartments Co. v. Commissioner of Internal Revenue,* 323 U. S. 141, 164, 65 S. Ct. 172, 185, 89 L. Ed. 139 (1944). The ambiguity of this statute was recognized by this Court in *Bass, supra.* Therefore, it cannot be said that this statute provides the *clearest mandate* for its retroactive application. Thus, this statute is not to be retroactively applied. As a result, the nexus with interstate must occur at some point after the date of enactment of this Act. Inasmuch as the only nexus with interstate commerce in the case at bar transpired prior to the date of enactment of this Act, the conviction rendered in the lower court cannot stand.

Wherefore, the petitioner asserts the opinion rendered by the Sixth Circuit Court of Appeals in this case erroneously decided an important question of federal law which has not been, but should be, decided by this Court; therefore, this Court should grant certiorari in the case at bar.

CONCLUSION

The reasons set forth above clearly show the Sixth Circuit Court of Appeals has both sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and decided an important question of federal law which has not been, but should be, settled by this Court. We urge this Court to grant certiorari to decide these questions.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-2137

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

HENRY FLETCHER THOMAS - - *Defendant-Appellant*

ORDER—Filed Feb. 24, 1975

Before: EDWARDS, PECK and LIVELY, Circuit Judges.

This appeal, perfected from the judgment of conviction following jury trial of the defendant-appellant for having been a convicted felon in possession of a revolver which had traveled in interstate commerce in violation of 18 U.S.C. App. § 1202(a)(1), has been submitted on the record on appeal and on the briefs and oral arguments of counsel for the parties. Appellant contends, inter alia, that although evidence of a prior conviction was properly received in evidence, the presence in the record of testimony by a government witness that appellant "was sentenced to five years" and had "served every day of that five-year sentence at both LaGrange and Eddyville" constituted prejudicial error. Rejecting the appellee's argument that the sentence imposed is relevant to the status of a prior conviction as a misdemeanor or felony, since that determination is based on the maximum sentence permitted by the statute under which the conviction was returned, we conclude that the

challenged evidence was improperly received. However, it is further concluded that in the light of the entire record the admission of such evidence was harmless error beyond a reasonable doubt. It is further concluded that the other contentions offered by the appellant are without merit, and acordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk